IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5217 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RUXMANIBEN WD/O AMBALAL FAKIRCHAND & 6 - Petitioner(s)

Versus

BIPINKUMAR LALLUBHAI PANDIT & 10 - Respondent(s)

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Appearance :

MR AJ PATEL for Petitioner(s) : 1 - 7.

MR PR NANAVATI for Respondent(s) : 1 - 11.

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 23/06/2006

ORAL JUDGMENT

1. By way of this petition under Article 227 of the Constitution of India, the petitioners -– heirs and legal representatives of deceased Ambalal Fakirchand - mortgagee in possession, who also claimed to be tenant under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as

“"the Act"” for convenience) have challenged the legality and validity of the judgement and order passed by the Gujarat Revenue Tribunal dtd.27/3/1990 in Revision Application No.TEN/BA/247 of 1982 in allowing the said revision application and quashing and setting aside the order passed by the Deputy Collector (Land Reforms) (Appeals), Ahmedabad dtd.21/10/1981 in Tenancy Appeal No.414/111/9/75 and restoring the order passed by the Mamlatdar and Agricultural Lands Tribunal ("ALT" for short), Sanand in Tenancy Case No.2020 of 1975.

2. The dispute is with regard to the land bearing Survey No.2033 admeasuring 3 Acres and 27 Gunthas of land situated at village Sanand, Taluka ; Sanand, District ; Ahmedabad. Deceased Ambalal Fakirchand was the mortgagee of the aforesaid land in question prior to 1941 and deceased Lallubhai Manilal Pandit and others were mortgagor. The mortgagor had filed a civil suit bearing Regular Civil Suit No.524 of 1968 against deceased Ambalal Fakirchand in the court of learned Civil Judge (SD), Ahmedabad Rural for redemption of the mortgage and for getting possession. In th said civil suit, deceased Ambalal Fakirchand claimed tenancy rights and therefore, an issue about the tenancy was raised. The learned Civil Judge (SD), Ahmedabad Rural referred the matter to the Mamlatdar and ALT, Sanand under sec.85-A of the Act for

giving finding on the issue with regard to the tenancy i.e. whether the deceased Ambalal Fakirchand can be declared to be tenant/deemed tenant with respect to the land in question under the provisions of the Act or not. The proceedings were registered as Tenancy Case No.2020 of 1975. The Mamlatdar and ALT, Sanand after conducting an inquiry, by order dtd.31/7/1975 decided that Ambalal Fakirchand is not tenant. The heirs of deceased Ambalal Fakirchand preferred an appeal before the Deputy Collector, Dholka who dismissed the said appeal and confirmed the order passed by the Mamlatdar and ALT dtd.31/7/1975. The matter was further carried to the Gujarat Revenue Tribunal by way of Revision Application No.88 of 1987 which also came to be dismissed by judgement and order dtd.8/7/1976. It appears that there was a review application filed before the Gujarat Revenue Tribunal and the Gujarat Revenue Tribunal remanded the matter. On remand, the Deputy Collector decided th matter holding the heirs of Ambalal Fakirchand as deemed tenants by his judgement and order dtd.21/10/1981. Being aggrieved and dissatisfied with the order passed by the Deputy Collector (Land Reforms) (Appeals), Ahmedabad dtd.21/10/1981 in Tenancy Appeal No.444/111/9/75, the respondents herein – heirs of mortgagor preferred a revision application before the Gujarat Revenue Tribunal being Revision Application

No.TEN/BA/247 of 982 and the Gujarat Revenue Tribunal b its impugned judgement and order dtd.27/3/1990 allowed the said revision application by quashing and setting aside the order passed by the Deputy Collector (Land Reforms) (Appeals), Ahmedabad. That thereafter, the petitioners herein preferred Review Application No.TEN/CA/18 of 1990 and the Gujarat Revenue Tribunal by its order dtd.6/5/1995 dismissed the said review application. Being aggrieved and dissatisfied with the judgement and order passed by the Gujarat Revenue Tribunal dtd.27/3/1990 in Revision Application No.TEN/BA/247 of 1982 as well as order passed by the Gujarat Revenue Tribunal dtd.6/5/1995 in Review Application No.TEN/CA/18 of 1990, the petitioners – heirs of original mortgagee named Ambalal Fakirchand have preferred the present petition under Article 226 of the Constitution of India.

3. Mr.A.J. Patel, learned advocate appearing on behalf of the petitioners has heavily relied upon the judgement of the Hon'ble Supreme Court in the case of ***A.A. Shirdone etc. Vs. Saheb H. Tajbhokhari,*** reported ***in AIR 1985 SC 836,*** more particularly para 18 of the said judgement and has submitted that as the mortgagor did not submit an application for declaration before the Mamlatdar within a period of one year of coming into force of the Amendment

Act of 1946 as provided under Sec.2(A) and 3(A) of the Act of 1939 for declaration that the deceased Ambalal Fakirchand was not tenant and therefore, they lost the right. Relying upon the aforesaid paragraph, he has submitted that even if the mortgagor succeeds before the Civil Court, in that case also, as held by the Hon'ble Supreme Court in the aforesaid decision, they will get only symbolic possession and not actual and physical possession of the land in question and therefore, it is submitted to allow the present petition by quashing and setting aside the judgement and order passed by the Gujarat Revenue Tribunal. He has submitted that admittedly the land was mortgaged prior to 1941 i.e. at the relevant time Act of 1939 was in force and therefore, the provisions of the Amendment Act of 1946 will not be applicable retrospectively and consequently, the petitioners are required to be declared as tenant or deemed tenant under the provisions of the Act and the Deputy Collector has rightly declared the petitioners as tenants and therefore, it is requested to allow the present petition.

4. Mr.Acharya, learned advocate appearing on behalf of Mr.PR Nanavati, learned advocate appearing for the respondents – heirs of mortgagor while relying upon para 17 of the judgement and order of the Hon'ble Supreme Court in the case of *A.A. Shirdone* (Supra) has submitted that the

Hon'ble Supreme Court has specifically held that the mortgagee in possession cannot be declared as a tenant and/or the mortgagee in possession does not become a deemed tenant under sec.2A of the Act of 1939. It is submitted that the present proceedings arises out of a reference by the Civil Court under sec.85(A) of the Act i.e. for declaration that whether the deceased Ambalal Fakirchand – mortgagee in possession is a tenant / deemed tenant or not and nothing further is required to be done in the present proceedings whether on redemption the mortgagee can get the actual and physical possession or not. He has submitted that all these issues are required to be considered by the Civil Court at the time of deciding the suit. He has also further submitted that in fact there is no question of approaching the tenancy court for getting possession. He has also further submitted that the suit before the learned trial court is for redemption of mortgage and for getting possession in which mortgagee in possession claimed tenancy rights and therefore, an issue was framed and referred to the tenancy court for deciding as to whether the mortgagee in possession is deemed tenant or nor. It is submitted that the moment it is declared that the mortgagee in possession is not a deemed tenant under the provisions of the Act, the Bombay Tenancy Act itself would not be applicable and therefore, only the Civil

Court would be competent to grant consequential relief on passing appropriate decree. Therefore, it is submitted that para 18 of the judgment should not be read in isolation and to be read along with para 17 of the judgment and therefore, it is requested to dismiss the present petition.

5. Heard the learned advocates appearing on behalf of the parties. It is not in dispute that the that Lallubhai Manilal Pandit and others were mortgagor and that the deceased Ambalal Fakirchand Mochi was mortgagee in possession prior to 1941. Mortgagor filed suit before the learned Civil Judge (SD), Ahmedabad Rural for redemption of mortgagee and for getting possession in which an issue came to be raised with regard to tenancy and the same came to be referred to the Mamlatdar and ALT under sec.85(A) of the Act. Under the circumstances, the present proceedings are arising out of reference of the Civil Court with regard to deciding the issue whether the mortgagee in possession – deceased Ambalal Fakirchand and/or his heirs can be declared as deemed tenant under the provisions of the Act or not. Nothing further is required to be done in the present proceedings. The learned advocate appearing on behalf of the petitioners has heavily relied upon para 18 of the judgement of the Hon'ble Supreme Court in the case of *A.A. Shirdone* (supra) and has submitted that as held by the Hon'ble Supreme Court in para 18 of the

aforesaid judgement, the respondents herein are not likely to get any actual and physical possession in the suit and therefore, they should be declared as tenant. At the same time, the learned advocate appearing on behalf of the respondents – heirs of mortgagee has relied upon para 17 of the aforesaid judgement. Para 17 of the said judgement reads as follows;

> *"17. In view of the aforesaid decision of this Court it cannot be argued for a moment that a mortgagee in possession becomes a deemed tenant under S.2A of the Act of 1939 on the strength of the saving provision in S.89(2)(b) of the Act of 1948. The contention of the appellants that they become deemed tenants under S.2A of the Act of 1939 has no force and cannot be accepted."*

6. Thus, considering various provisions of the Act of 1939 as well as Amended Act of 1946, the Hon'ble Supreme Court has held that the mortgagee in possession cannot be declared as deemed tenant under sec.2(A) of the Act of 1939 on the strength of savings provisions in sec.89(2)(b) of the Act of 1948. Thus, there is a clear-cut finding of the Hon'ble Supreme Court that the mortgagee in possession cannot be declared as a deemed tenant. Considering the above, when the Gujarat Revenue Tribunal has allowed the revision application and has answered the issue that the mortgagee in possession i.e. deceased Ambalal Fakirchand and heirs of deceased Ambalal Fakirchand cannot be declared as deemed tenant,

it cannot be said that there is any illegality committed by the Gujarat Revenue Tribunal. The Gujarat Revenue Tribunal has rightly considered that except answering the reference of the civil court, nothing further is required to be done and the question with regard to the possession etc. is not required to be considered at this stage and it is required to be considered by the Civil Court. Thus, the question with regard to granting actual possession on passing the decree can be granted or not, is kept open and the same is not required to be decided in the present proceedings which is arising out of issue with regard to the tenancy only. Considering para 17 of the judgment of the Hon'le Supreme Court, the petitioners – heirs of deceased Ambalal Fakirchand i.e. the mortgagee in possession cannot be declared as deemed tenant and therefore, the order passed by the Deputy Collector (Land Reforms) (Appeal) is rightly quashed and set aside by the Gujarat Revenue Tribunal. No illegality has been committed by the Gujarat Revenue Tribunal in allowing the revision application and quashing and setting aside the order passed by the Deputy Collector (Land Reforms) (Appeals) or answering reference that the petitioners – heirs of mortgagee in possession cannot be declared as deemed tenant. Thus, the reference is answered accordingly.

7. For the reasons stated hereinabove, there is no substance in the present petition and the same is required to be dismissed and is accordingly dismissed. Rule is discharged. Interim relief granted earlier stands vacated forthwith. However, there will be no order as to costs.

(M.R.SHAH, J.)

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